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*Before the California Little Hoover Commission*  
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Thank you for the opportunity to address this Commission concerning evidence-based strategies for intervening with substance-abusing individuals involved with the criminal justice system.

The importance of this issue is underscored, first, by the fact that 80% of offenders, regardless of the nature of their offense, are involved with drugs or alcohol<sup>1</sup> and nearly one-half are clinically addicted;<sup>2</sup> and second, that virtually all drug policies to date in this country have failed to correct this problem.<sup>3</sup> The policies have gone by various names — “War on Drugs,” “Rehabilitation Era,” “Intermediate Sanction Movement,” “Decriminalization,” “Medicalization” — but have all suffered from the same basic conceptual flaw: Each has viewed drug abusers or drug-abusing offenders as an homogenous class of individuals whose pathologies can be easily encapsulated and explained with a single turn of a phrase, a single causal philosophy, or a simple slogan.

The research evidence is unambiguous that substance abuse and substance dependence constitute an array of syndromes involving varying degrees of genetic vulnerability, environmental influences, trauma, role-modeling, brain injury, characterological deviance, and/or run-of-the-mill

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<sup>1</sup> E.g., Belenko & Peugh (1998). *Behind bars: Substance abuse and America's prison population*. New York: Center on Addiction & Substance Abuse at Columbia University.

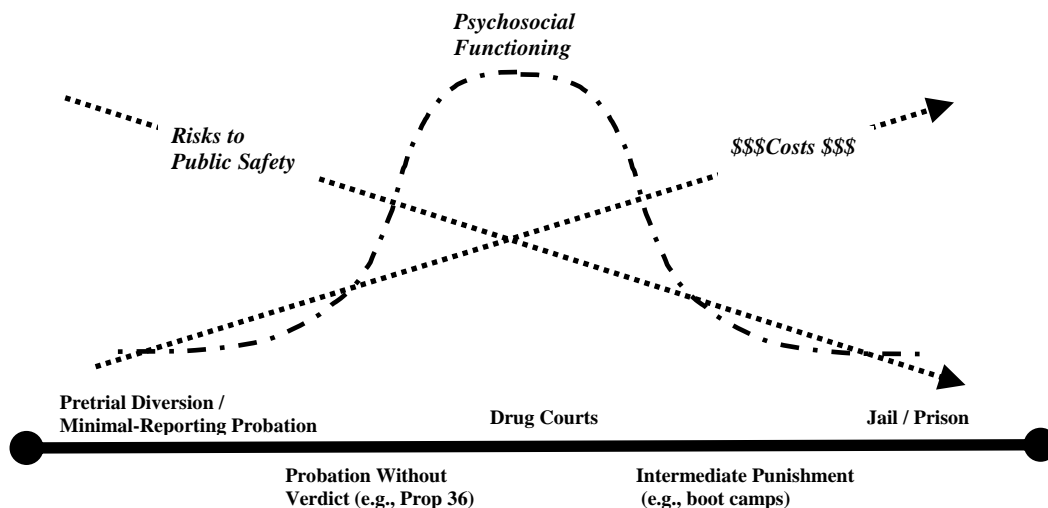
<sup>2</sup> E.g., Karberg & James (2005). *Substance dependence, abuse, and treatment of jail inmates, 2002*. Washington, DC: Bureau of Justice Statistics, U.S. Dept. of Justice.

<sup>3</sup> For reviews, see Marlowe (2003). Integrating substance abuse treatment and criminal justice supervision. *NIDA Science & Practice Perspectives*, 2(1), 4-14; Marlowe (2002). Effective strategies for intervening with drug abusing offenders. *Villanova Law Review*, 47, 989-1025.

mischief.<sup>4</sup> Our interventions must, therefore, be similarly heterogeneous and targeted to the appropriate symptoms and dysfunctions exhibited in specific cases. A one-size-fits-all approach is decidedly naïve and scientifically baseless. It inevitably leads to a misallocation of resources, failed opportunities for success, and even “iatrogenic effects” (that is, negative side-effects) in which, as will be discussed, our well-intentioned actions have frequently backfired and made matters worse.

The good news is that a continuum of correctional options already exists in virtually all U.S. jurisdictions for intervening with drug-involved offenders (see Figure 1). Programs at one end of this continuum primarily emphasize public-health or rehabilitation goals using less restrictive means, whereas those at the other end primarily emphasize public-safety or correctional goals with restrictive conditions. Programs in the center strive to integrate elements of both public-health and public-safety strategies by combining criminal justice supervision and strict accountability with intensive mandated community-based treatment.

**FIGURE 1: Continuum of Community-Based Correctional Programs for Drug-Abusing Offenders**



<sup>4</sup> See, e.g., Marlowe et al. (2004). Drug dependence is omnigenus: The disease analogy and criminal justice policy. *Offender Substance Abuse Report*, 4, 65-78.

The programs may go by different names and differ in certain respects across jurisdictions; however, the basic contours are as follows:

### **Public Health Strategies**

- **Pre-trial diversion or minimal-reporting probation** permit certain summary offenders and low-level misdemeanor offenders to avoid a criminal record by remaining arrest-free for a specified period of time, satisfying minimal reporting obligations, and perhaps completing treatment requirements. Upon satisfaction of the conditions, the charge is dropped and the record expunged. Record expungement may entitle the individual to respond truthfully on an employment application or similar document that the event did not occur for legal purposes.
- **Probation without verdict** puts additional “teeth” into diversion by requiring the individual to plead guilty or no contest to the offense. The plea is then held in abeyance and the offender is sentenced to probation with conditions for treatment and supervision. Satisfaction of the conditions leads to the plea being vacated and perhaps to the opportunity for record expungement. Failure can lead to immediate sentencing and disposition. Under Proposition 36, California is experimenting with this model for all drug-possession offenders who do not have a history of an exclusionary crime. Proposition 36 offers three opportunities to fail at probation before allowing a revocation unless the state can demonstrate that the offender is a danger to public safety or non-amenable to treatment.

### **Public Safety Strategies**

- **Incarceration** is authorized by statute (and recommended by sentencing guidelines in some jurisdictions) and is weighted in severity by such factors as the amount and/or nature

of the drug involved, prior offense history, enumerated aggravating or mitigating factors, and whether the crime involved distribution or manufacturing apart from possession.

- **Intermediate punishment** refers to a range of community-based sentences imposed in lieu of incarceration. Common examples include correctional halfway houses, day reporting centers, home detention, intensive supervised probation (ISP) and boot camps.

### **Integrated Public Safety and Public Health Strategies**

- **Drug Courts** are special criminal-court dockets that combine mandatory drug abuse treatment and case management services with intensive judicial supervision, regularly scheduled status reviews in court, random weekly urine testing, and escalating sanctions for infractions and incentives for accomplishments in the program. Often, defendants must plead guilty or stipulate to the facts in the criminal complaint as a condition of participation in the program. Pre-adjudication drug courts may also contain a diversionary component similar to probation-without-verdict.

Importantly, each of these options is associated with specific benefits and burdens that may be in direct tension with one another. For example, as one moves from left to right on the continuum in Figure 1, the costs of the interventions increase exponentially with the greatest expenditures associated with incarceration. On the other hand, short-term risks to public safety decline appreciably from left to right (at least while the offenders are under the supervision of the programs). To make matters more complicated, effects on the psychosocial functioning of offenders appear to follow a “curvilinear” pattern, in which the best outcomes are elicited by interventions in the middle of the spectrum and the worst outcomes are produced by those at either extreme. In fact, evidence suggests there may be iatrogenic effects from programs at either extreme of the continuum, in which

drug use and criminal recidivism may actually *increase* as a function of greater exposure to the interventions.

The difficult task facing policymakers is to select from this continuum the most effective and cost-efficient programs for use with the large population of drug abusers coming before their courts and into their correctional systems each year. Unfortunately, what this has meant historically is the over-application of one paradigm for the entire drug-offender population.

For example, the War on Drugs of the 1980s emphasized incapacitation and general deterrence for a large proportion of drug offenders. This strategy, in fact, appears to have contributed to a plateau or possible reduction in then-rising crime and violence rates, and this favorable impact cannot be ignored from a public-safety perspective. Unfortunately, it paid insufficient attention to countervailing considerations of cost and the psychosocial impact of incarceration on individuals, their families, and their communities. The result was skyrocketing correctional costs, court-imposed caps on prison overcrowding, and devastation for already over-burdened minority and low-SES communities. Moreover, this strategy appears to have had minimal post-release effects on crime or drug use. The best we can tell is that the average effect size of prison on crime following release is approximately *zero*.<sup>5</sup> Within 3 years of their release from prison, nearly two-thirds of all inmates, including drug offenders, are re-arrested for a new crime, one-half are convicted beyond a reasonable doubt of a new crime, and one-half are re-incarcerated for a new crime or parole violation.<sup>6</sup> Equally discouraging, 70% to 85% of drug-abusing inmates return to drug use within 1 year of release from prison and 95% return to drug use within 3 years.<sup>7</sup> In short, whatever gains

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<sup>5</sup> Gendreau et al. (2000). The effects of community sanctions and incarceration on recidivism. *Forum on Corrections Research*, 12, 10-13.

<sup>6</sup> Langan & Levin (2002). *Recidivism of prisoners released in 1994*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

<sup>7</sup> E.g., Hanlon et al. (1998). The response of drug abuser parolees to a combination of treatment and intensive supervision. *Prison Journal*, 78, 31-44; Martin et al. (1999). Three-year outcomes of therapeutic community

were achieved during the interval of incarceration, either for the offenders or for society at-large, were rapidly and decisively lost soon after release.

More recently, Proposition 36 in California emphasized a one-size-fits-all approach intended to be diametrically opposed to the War on Drugs. The lion's share of drug-possession offenders would now be diverted into treatment in lieu of incarceration and the courts would be prevented from responding to noncompliance with appreciably more than toothless demands for more treatment. The results were predictably lackluster. Roughly one-quarter of the offenders never arrived for a single session, 60% of those who did arrive dropped out of treatment before receiving a minimally adequate dosage of 3 months of services, and only one-quarter completed treatment.<sup>8</sup> Worse still, evidence suggests crime rates may actually have *increased*, at least during the early years.<sup>9</sup>

Undaunted, some advocates for Proposition 36 argue, correctly, that it has been cost-effective. This exposes a little-recognized secret in cost-offset analyses: It is possible for an intervention to be ineffective but still cost-effective. It simply needs to be less ineffective and/or less costly than the alternative(s). Assuming that the offenders enrolled in Proposition 36 would otherwise have been jail-bound (a dubious assumption given jail and prison overcrowding in California), almost anything done to them would have been cheaper than an incarcerative sentence. Moreover, almost anything would have been at least as influential on crime and drug use given that incarceration as a sentence has virtually no effect on either of those outcomes during the post-release period.

It is unlikely, however, that this is what voters had in mind when they enacted Proposition 36. Moreover, it leaves open the question regarding what as-yet unrecognized or unmeasured costs

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treatment for drug-involved offenders in Delaware. *Prison Journal*, 79, 294-320; Nurco et al. (1991). Recent research on the relationship between illicit drug use and crime. *Behavioral Sciences & the Law*, 9, 221-249.

<sup>8</sup> University of California, Los Angeles. (2005). *Evaluation of the Substance Abuse and Crime Prevention Act, 2005 Report*. Los Angeles: UCLA Integrated Substance Abuse Programs.

<sup>9</sup> Farabee et al. (2004). Recidivism among an early cohort of California's Proposition 36 offenders. *Criminology & Public Policy*, 3, 563-584.

Proposition 36 may have passed on to California citizens, now or in the future, including victimization costs from increased crime rates, emergency room costs from continuing drug misuse, and associated costs related to child welfare, unemployment and the like.

Clearly, Proposition 36 is an improvement over the War on Drugs, but it requires amendments and should not in its current form be applied to the entire population of drug-possession offenders. Some offenders may be well-suited to this diversionary mechanism and may respond adequately to the opportunity for treatment with minimal interference from correctional authorities. Others will require substantially greater monitoring, accountability and restrictive conditions.

### **Matching By Risk and Needs**

Substantial research has been conducted investigating the critical elements of programs for drug-abusing offenders and determining which types of individuals are best suited for which types of programs.<sup>10</sup> The results indicate that to achieve effective outcomes, it is essential to match drug offenders to specific types of programs based upon simultaneous attention to their (1) *criminogenic risks* and (2) *psychosocial needs*.

*Criminogenic risks* are those characteristics of offenders that make them more likely to relapse to drug misuse and less likely to succeed in rehabilitation, and thus more likely to recidivate. The most reliable and robust high-risk factors include an earlier onset of substance abuse (especially prior to age 14) or crime (especially prior to age 16), a younger age during rehabilitation (especially younger than 24 years old), a recidivist criminal record, previously unsuccessful attempts at rehabilitation, and a co-existing diagnosis of antisocial personality disorder.<sup>11</sup>

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<sup>10</sup> See Taxman & Marlowe (Eds.) (2006). Risk, needs, responsivity: In action or inaction? [Special Issue] *Crime & Delinquency*, 52(1).

<sup>11</sup> E.g., Gendreau et al. (1996). A meta-analysis of the predictors of adult offender recidivism: What works! *Criminology*, 34, 575-596; Marlowe et al. (2003). Amenability to treatment of drug offenders. *Federal Probation*, 67, 40-46.

*Psychosocial needs* are those areas of dysfunction that, if ameliorated, can substantially reduce the likelihood of continued involvement in substance abuse, crime or other misconduct. Examples of high-need factors include compulsive addiction to drugs or alcohol, psychiatric pathology, emotional trauma, brain injury, chronic medical conditions and illiteracy.

Importantly, this does *not* imply that high-risk or high-needs individuals should necessarily be denied opportunities to participate in rehabilitation or diversion programs. Rather, more intensive and better skilled community-based programming is required to improve their outcomes. Unfortunately, attention to risk-and-needs profiles has been scant, at best, in the criminal justice system. To the extent that offenders are classified on these dimensions at all, authorities have typically focused almost exclusively on risks to the exclusion of needs. Moreover, risk has often been equated, wrongly, with the statutory offense classification for the current crime or prior offenses. Although offense history is certainly relevant to this determination, it is not dispositive and much additionally important information is often lost or ignored. Finally, risk has often been assumed, wrongly, to equate to risk for violence or dangerousness, which may lead some drug offenders to be unnecessarily denied access to community-based services.

A highly useful approach to risk-and-needs classification employs a 2-by-2 conceptual matrix<sup>©™</sup> which simultaneously matches offenders on both dimensions to one of four quadrants having direct implications for selecting suitable correctional dispositions and behavioral care plans (see Figure 2). Embedded in this matrix are general indications for the types of interventions that are likely to be required for individuals in each quadrant. Some of these indications have been proven to be necessary in rigorous scientific studies, such as the importance of holding frequent status hearings in



court for high-risk individuals.<sup>12</sup> Others have been derived from research studies with non-offender populations, clinical best-practice standards, and observations from correctional program evaluations.

**FIGURE 2: Risk-and-Needs Quadrants and Associated Practice Recommendations for Drug-Abusing Criminal Offenders<sup>®TM</sup>**

		<b>Criminogenic Risks</b>	
		<b>High</b>	<b>Low</b>
<b>Psychosocial</b>	<b>High</b>	<b><u>Drug Court</u></b> <ul style="list-style-type: none"> <li>• Court supervision</li> <li>• Status calendar</li> <li>• Intensive drug treatment</li> <li>• Rewards &amp; sanctions</li> <li>• UA monitoring</li> </ul>	<b><u>Intensive Drug Probation</u></b> <ul style="list-style-type: none"> <li>• Probation supervision</li> <li>• Noncompliance calendar</li> <li>• Intensive drug treatment</li> <li>• Rewards &amp; sanctions</li> <li>• UA monitoring</li> </ul>
	<b>Low</b>	<b><u>Supervised Probation</u></b> <ul style="list-style-type: none"> <li>• Probation supervision</li> <li>• Status calendar</li> <li>• Pro-social rehabilitation</li> <li>• Rewards &amp; sanctions</li> <li>• Intermediate punishment for noncompliance</li> </ul>	<b><u>Minimal Reporting Probation</u></b> <ul style="list-style-type: none"> <li>• Pretrial svcs supervision</li> <li>• Noncompliance calendar</li> <li>• Prevention / education</li> </ul>

The essential point here is that interventions which are well-suited to individuals in one quadrant may be unnecessary (and thus wasteful of scarce resources) or even contraindicated (and thus harmful) for individuals in another quadrant. Take, for example, a “high risk/high needs” individual. Imagine a 13 year-old adolescent boy who begins to hang out with the wrong crowd, starts using cigarettes, beer and marijuana, and eventually moves on to harder drugs by his mid-teens. That same boy begins to engage in truancy, lying, petty thefts and vagrancy at an early age and moves on to burglaries by his late teens. He is now arrested on a new drug charge at the age of 23 and is compulsively addicted to cocaine. It would be naïve to think that providing drug treatment alone

<sup>12</sup> Marlowe et al. (2007). Adapting judicial supervision to the risk level of drug offenders: Discharge and six-month outcomes from a prospective matching study. *Drug & Alcohol Dependence*, 88S, 4-13; Marlowe et al. (2006). Matching judicial supervision to clients’ risk status in drug court. *Crime & Delinquency*, 52, 52-76.

would be remotely sufficient to help this individual. Providing a simple diversionary opportunity (a la Proposition 36) would be apt to invite disappointing failure, threaten public safety, waste treatment resources due to repeated no-shows and attrition, interrupt the recovery efforts of other individuals in the treatment programs, and expose less serious offenders to his antisocial values and propensities. This individual requires, at a minimum, an integrated program of close surveillance, status reviews by a judge or other authority with the power to respond meaningfully (including with jail sanctions) to transgressions, immediate consequences for both infractions and accomplishments, and intensive mandated treatment. Anything less would be wishful thinking.

Now imagine an individual with a long history of intravenous heroin addiction. All of her criminal activity serves to feed her drug habit, including petty thefts, prostitution and low-level dealing or bartering. But for her addiction, this criminal activity would not have occurred. For this “Low Risk/High Needs” woman, it makes perfect sense to provide treatment in lieu of criminal justice entanglements. So long as she is receiving the treatment she needs, the criminal justice system does not need to expend substantial resources on her. Indeed, requiring her to spend time with the man in the above example could expose her to antisocial influences and perhaps predation. Instead, she might very well be suited to something akin to Proposition 36 that offers treatment as the primary focus of the intervention. There must, however, be meaningful consequences if she stops going to treatment. Allowing her to continue to fail and use drugs would be a betrayal both to her and to the community.

### **Recommendations for California**

What does this mean for California? First, it means the rivalry between competing camps (e.g., Proposition 36 vs. drug courts) needs to stop — now. Most constituencies have a piece of the answer, but only a piece. The time has come to move to a *systemic model* which includes:

- valid, reliable and timely risk-and-needs triaging of drug offenders at the point of arrest;
- ensuring the assessment results are available in real time for disposition;
- targeting of individuals into appropriate and cost-efficient programs;
- statutory provisions enabling seamless and rapid transfers of individuals from one program to another in light of demonstrative evidence of a need to alter the care plan;
- careful and continuous measurement of performance and outcomes not for the purpose of proving that a particular program “works” but rather to show for whom it works, under what circumstances, at what cost, and who it harms;
- adequate funding—perhaps derived, in part, from cost savings realized by other state agencies such as corrections or child welfare—to support both the services and the research evaluations.

As for California law, additional statutory amendments will be required. Referral to Proposition 36 might continue to include consideration of eligible charges but that should not be dispositive. Regardless of the offense classification, evidence of high criminogenic risk should trigger additional authorizations for court-based supervision on a status calendar or noncompliance calendar, coupled with a standardized sequence of graduated sanctions and rewards. And, despite all that has been said thus far about the shortcomings of incarceration as a final sentence, this statutory authorization should include provisions for *brief* jail sanctions lasting up to several days for serious or repeated transgressions. Unlike the use of incarceration as a sentence, jail sanctions are brief in duration, the offender remains continuously enrolled in community-based programming, and the offender is welcomed back into treatment immediately upon release. Although scant research has addressed the utility of brief jail sanctions, some evidence suggests they could permit programs to exercise greater

leverage over participants without risking many of the serious iatrogenic effects associated with longer-term imprisonment.

In addition, one failure on Proposition 36 should, in many cases, constitute ample evidence that more intensive services are required and referral to drug court may be necessary. It makes little sense to require three consecutive failures at the same program before altering the care plan. Research reveals that each treatment failure increases the likelihood of future failures;<sup>13</sup> therefore, the essential course of action is to intervene proactively as soon as possible once failure appears reasonably imminent.

Conversely, some individuals with serious criminal offense histories, who are currently ineligible for Proposition 36, may on further evaluation turn out to be higher-need and lower-risk than their official record of offending would suggest. For them, the basic policy underlying Proposition 36 of avoiding incarceration and offering opportunities for redemption and rehabilitation might be just the thing to save lives, save communities, and save money.

Finally, statutory mechanisms such as Proposition 36 should not be exclusively available in cases involving simple drug possession. Many crimes are fueled substantially or primarily by drug addiction or related psychosocial impairments. Where the evidence suggests addiction is substantially causative in other forms of nonviolent criminal activity, prosecutorial discretion should include opportunities to employ diversionary programs similar to drug courts or Proposition 36 as amended to include continuous court monitoring and graduated sanctions and incentives.

## **Conclusion**

In summary, the relationship between drug abuse and crime is complex and multidimensional. When it comes to effective responses for substance-abusing offenders, a one size approach most assuredly does *not* fit all. Rather, we need to tailor our criminal justice interventions based upon

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<sup>13</sup> E.g., Marlowe et al., *supra* note 11.

offenders' criminogenic risks and psychosocial needs. We need a systemic model derived from sound scientific evidence and not political ideology. Fortunately, many of the pieces are already in place. We need to improve them, organize them more efficiently, remove unwarranted barriers, and implement them more appropriately and effectively.

Again, I wish to thank the members of the Little Hoover Commission for their important work and for the opportunity to address the Commission on a matter bearing directly on my professional interests that has such essential implications for the public's interest. I will be happy to answer any additional questions or provide additional supporting documentation at the Committee's request.

*Respectfully Submitted,*

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